SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 437

LOUIS L. ATKINS,
Plaintiff,

versus

GREENVILLE SHIPBUILDING CORPORATION,
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Reasons for Granting This Petition	3
Argument	3
Summary	6
Appendix A	9
Appendix B	23
Appendix C	31

AUTHORITIES

Cases:

Bernardo v. Bethlehem Steel (2 Cir. 1963), 314 F. 2d 604	3, 6
Boatel v. Delamore, 279 F. 2d 850 (5 Cir., 1967)	4
Butler v. Whitman, 356 U.S. 271; 2 F. 2d 754 (1958)	7
Guilbeau v. Falcon Seaboard Drilling Co., 215 F. Supp. 909, 911-912 (E.D., La., 1963)	6
Kellar v. U.S., 273 F. Supp. 945 (USDC, New Orleans Division)	4
Offshore Co. v. Robinson, 266 F. 2d 769 (5 Cir., 1959)	4
Producers Drilling Co. v. Gray, 361 F. 2d 432 (5 Cir., 1967)	4, 7
Reed v. Yaka, 373 U.S. 410; 83 S.Ct. 1349, 10 L. Ed. 2d 488 (1963)	3

Statutes:

U.S. Constitution, Art. 3, § 2, Cl. 1	2
Federal Rules of Civil Procedure, 9H	2

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969

No.

LOUIS ATKINS,

Plaintiff,

versus

GREENVILLE SHIPBUILDING CORPORATION,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Louis Atkins, prays that a writ of certiorari issue herein to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit, affirming the granting of a summary judgment by the United States District Court for the Northern District of Mississippi.

OPINIONS BELOW

The District Court for the Northern District of Mis-

sissippi rendered an opinion which is reprinted as Appendix "A" hereof.

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the judgment is reprinted as Appendix "B" hereof.

Pertinent excerpts from the depositions of respondent's superintendent, Harry Mason, are reprinted as appendix C hereof.

JURISDICTION

Original Federal jurisdiction of this cause was predicated upon the General Maritime Law of the United States, United States Constitution, Art. 3, § 2, Cl. 1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution, Art, 3, § 2, Cl. 1; Federal Rules of Civil Procedure, 9H.

STATEMENT OF THE CASE

Petitioner, Louis Atkins, brought action against the defendant in admiralty, pursuant to F. R. C.P. 9H.

On and prior to July 26, 1966, plaintiff had been employed as a welder aboard defendant's floating drydock which was moored on a navigable body of water in Greenville, Mississippi, known as Lake Ferguson.

His complaint alleged that the drydock was a vessel and that on July 26, 1966, he was injured as a result of the vessel's unseaworthiness, basing his claim upon the doctrine enunciated by this Court in *Reed v. Yaka,* 373 U.S. 410; 83 S. Ct. 1349, 10 L. Ed. 2d 488 (1963). Defendant moved for and was granted a summary judgment. Petitioner appealed to the United States Court of Appeals, Fifth Circuit, which affirmed the dismissal of petitioner's action on May 12, 1969. Hence, petitioner files this application for certiorari.

REASONS FOR GRANTING THIS PETITION

The decision of the Fifth Circuit Court of Appeals in the above matter presents a clear-cut conflict with the decision of the 2d Circuit Court of Appeals in *Bernardo v. Bethlehem Steel,* (2 Cir. 1963) 314 F. 2d 604. Additionally, the Appellate Court's opinion is in conflict with the rationale and spirit of opinions of this Court, as well as other opinions of the Fifth Circuit Court of Appeals, itself.

ARGUMENT

It will be noted that the decision of the District Court and that of the Fifth Circuit Court of Appeals rest upon entirely different grounds. The trial court erroneously assumed that plaintiff was claiming a warranty of seaworthiness in respect to the Barge KCB 300 that was aboard respondent's drydock for repairs. Of course, petitioner made no such contention nor could one have been made. *Reed v. Yaka, supra,* is limited to an employer-owned vessel; respondent did not own the KCB

300. Petitioner's claim was based upon the assertion that respondent's floating *drydock* was a vessel.

Recognizing that the District Court's determination could not be sustained on the basis stated, the Appellate Court affirmed on a ground not even considered by the trial court and ruled on the central and only issue in this case and:

HELD AS A MATTER OF LAW THAT A FLOATING DRYDOCK IS NOT A VESSEL.

The Court of Appeals' decision is completely contrary to the *rationale* of this Court's decisions and indeed, in direct conflict with several of its own prior decisions.

In *Offshore Co. v. Robinson,* 266 F. 2d 769, (Cir. 5, 1959), an historic and landmark opinion, it was recognized that special purpose vessels and those who man them were subject to the same maritime rules as traditional vessels and crews. Eight years later this same Appellate Court in a forward-looking decision that weighed present day realities in the maritime field held that such special purpose floating objects *as a matter of law were vessels; Producers Drilling Co. v. Gray,* 361 F. 2d 432 (Cir. 5, 1967). This was followed in *Kellar v. U. S.,* 273 F. Supp. 945 (U.S.D.C. New Orleans Division) and *Boatel v. Delamore,* 379 F. 2d 850 (Cir. 5, 1967).

In light of the above, it is somewhat surprising that the Court's opinion in the case at bar harkens back to criteria that it rejected over a decade ago, i.e.:

(1) Lack of motive power;

(2) Permanent anchorage;

(3) The fact that the drydock was not designed primarily or used primarily for navigation or transportation.

Of course, dredges, derrick barges, submersible drilling rigs (and numerous other types of specialized watercraft):

(1) Have no motive power;

(2) Spend months and/or years at a single anchorage;

(3) Are obviously not designed primarily for navigation or the carriage of passengers and cargo.

Respondent's drydock is admittedly a large object, floating in navigable waters. It is capable of carrying passengers and cargo; it could be moved and used to transport goods and persons to any port in the world should its owner so desire. (See Appendix "C") The law is clear that:

> "The word 'vessel' includes every description of watercraft or other *artificial contrivance used or capable of being used*, as a means of transportation on water." (Emphasis added.)

Vol. 1, Norris, The Law of Seamen, 2d Ed. Sec. 9.

Respondent has relied heavily upon the argument that petitioner was not "doing a seaman's work and incurring a seaman's hazard" and this is reflected in the trial and Appellate Court opinions.

Historically, wooden sailing ships, included carpenters and shipwrights as regular crewmen. This was a necessity since in case of vessel damage at sea, on the spot repairs and reconstructions would be essential. But petitioner urges that this is not an issue before this Court. Oil field drillers, tool pushers, roustabouts, and derrick operators are hardly "*doing a seaman's traditional work*" — yet they admittedly are entitled to all maritime remedies if injured aboard a "vessel". See also, *Guilbeau v. Falcon Seaboard Drilling Co.*, 215 F. Supp. 909, 911-912 (E.D., La., 1963).

SUMMARY

In conclusion petitioner respectfully submits that the opinion of the Fifth Circuit creates an arbitrary distinction where no difference exists.

It is patent that this holding by the Fifth Circuit is in direct conflict with *Bernardo, supra,* which expressly held the exact same issue to be one for the jury. The Appellate Court appears to lose sight of the fact that the decisions involving drydocks, cited on page 8 of the opinion, *were fact findings, not summary adjudications.* Nor can the result be reconciled with the

Fifth Circuit's decision in *Producers' Drilling Co. v. Gray, supra,* except by forging a completely illogical rule to the effect that a special purpose craft drilling for oil, as a matter of law is a vessel but one engaged in vessel-repair, as a matter of law, is not.

We believe this Court's decision in *Butler v. Whitman,* 356 U.S. 271; 2 Fed. 2d 754 (1958), constitutes an express ruling by this Court that issues such as here presented are for the jury.

The true rationale of the opinion by the Appellate Court rests in its statement that: (Page 4)

> *"Seas Shipping Co. v. Sieracki,* 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, *and its progeny, Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.,* 1956 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133; *Reed v. The Yaka,* 1963, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448; *Jackson v. Lykes Bros. SS Co.,* 1967 386, U.S. 731, 87 S. Ct. 1419, 18 L. Ed. 2d 488, *has resulted in metastasis, if not emasculation of The Act's exclusiveness of remedies provision.*

The appellate decision disapproves of this Court's extension of the doctrine of seaworthiness and by its conclusions, not only seeks to turn back the clock, but will have created considerable inconsistency and confusion in this phase of the maritime law should the result remain unchanged by a ruling from this Court.

All of which is

Respectfully submitted,

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CERTIFICATE

I, the undersigned member of the Bar of this Court, hereby certify that three copies of the foregoing Petition have been served upon opposing counsel by depositing the same, air postage pre-paid, in the U. S. Mails, properly addressed at New Orleans, La., this ____ day of June, 1969.

Samuel C. Gainsburgh

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

LOUIS L. ATKINS,

Plaintiff,

versus

No. GC6732

GREENVILLE SHIPBUILDING CORPORATION,

Defendant.

ORDER

In accordance with the memorandum opinion of the court this day released, it is,

ORDERED:

1) That defendant's motion for summary judgment shall be, and is, sustained, and judgment in this cause shall be, and is hereby, entered for the defendant, with plaintiff to take nothing by his complaint which is hereby dismissed with prejudice.

2) Costs are awarded to defendant as they may in course be taxed.

This the 14th day of June, 1968.

(Signed) CLAUDE F. CLAYTON
CLAUDE F. CLAYTON
UNITED STATES
CIRCUIT JUDGE
Sitting by Special Designation
as District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

LOUIS L. ATKINS,

Plaintiff,

versus

No. GC6732

GREENVILLE SHIPBUILDING CORPORATION,

Defendant.

MEMORANDUM OPINION

This is an action for personal injuries allegedly sustained by the plaintiff as the result of the unseaworthiness[1] of a "vessel" owned and controlled by the de-

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[1]The doctrine of unseaworthiness and the owner's absolute liability for the lack of it was first announced in *The Osceola*, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760:

> The vessel and her owners are . . . liable to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in proper order the proper appliances appurtenant to the ship.

fendant, Greenville Shipbuilding Corporation. The defendant is currently engaged in the business of designing, constructing and repairing marine vessels and was so engaged at the time of the plaintiff's injury. After answer, the defendant moved for summary judgment, and the merits vel non of this motion have been submitted on briefs, affidavits, the fruits of discovery and the pleadings and are now for resolution.

Factually, it appears that plaintiff received the injury complained of on July 26, 1966, while employed as a welder and a fitter performing repair work on the Barge K.C.B. 300. This repair work was being conducted on a floating dry dock which was built by the defendant and is situated adjacent to the bank of Lake Ferguson. Its position is stationary and is maintained by cables running from said dock to the bank of the lake.

This dock, as its name suggests, has the capacity of completely removing marine vessels from the water so as to permit repair to and inspection of their bottoms. It is undisputed that Barge K.C.B. 300 was so removed from the water and was so situated on the defendant's dry dock at the time of the injuries to the plaintiff. By uncontroverted affidavit, it is asserted that when said barge was delivered to the defendant's dry dock, it was empty of cargo and devoid of crew. It is also established that the dry dock has no power to propel itself and that the only way it could be moved would be through the use of an outside source of power, such as a towboat or other powered vessel.

However, it has not been moved from its final position where it was located when constructed in 1962.

As stated, while engaged in the repair of this barge, the plaintiff is alleged to have sustained his injury. His injury purportedly occurred when plaintiff, in ascending a ladder leading from the floor of the dry dock to the barge undergoing repairs, fell to the dry dock's floor. The ladder is said to have slipped causing this fall.

Following this accident, the plaintiff made a claim for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act. As a result of this claim, plaintiff has received $2,941.30 in compensation benefits covering the period July 26, 1966, through June 13, 1967.

It is the defendant's contention, initially, in support of its motion that the plaintiff is an employee covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901, et seq., and that as such, he is barred from bringing this action due to that act's exclusiveness of liability provision. This contention prompts an examination of the relevant sections of the act.

The section of said act dealing with coverage provides:

> Compensation shall be payable under this chapter with respect of disability or death of an employee, but only if the disability or death

> results from an injury occurring upon the navigable waters of the United States (including any dry dock) . . . .
>
> 33 U.S.C.A. § 903 (a).

An employer under the act "means an employer of any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)". 33 U.S.C.A. § 902 (4). It is well settled that workmen performing duties on dry docks are engaged in maritime employment at a place within the admiralty jurisdiction so as to render their death or injury compensable under this act. In *Flowers v. Travelers Insurance Company*, 258 F.2d 220 (5 Cir. 1958), the appellant was found to come within the coverage of the act. Factually, the appellant was injured while performing duties as a welder making repairs to a vessel while in dry dock. The court said:

> The setting was wholly maritime. The vessel, if not actually floating *in* navigable waters, was there in law. For she was in a floating dry dock which by all tests made the place of injury maritime. (Citing cases.) The work he was doing was maritime. (Emphasis supplied.) 258 F.2d at 221.

See also *Newport News Shipbuilding and Dry Dock Company v. O'Hearne Deputy Com'r*, 192 F.2d 968 (4 Cir. 1951); *Travelers Insurance Company v. McManigal*, 139 F.2d 949 (4 Cir. 1944). It is also clear, and the

court so holds, that Lake Ferguson is a navigable waterway, a fact which is within the judicial knowledge of this court. See *Lands v. A Cargo of 227 Tons of Coal*, 4 Fed. 478 (C.C. D.C.N.J. 1880). Accordingly on the undisputed facts here presented, the plaintiff was an employee "employed in maritime employment" who was engaged in employment within the navigable waters of the United States and, as such, is an employee covered by the act. As the Court of Appeals for this circuit recently noted:

> Injuries occurring on dry docks, which are located on navigable waters and used to raise the ship out of water to permit examination or repairs to its hull, impossible while the ship is afloat, are within Longshoremen's Act coverage by express statutory inclusion. (Citing cases.)
>
> *Travelers Insurance Company v. Shea*, 382 F. 2d 344 (5 Cir. 1967).

Thus, the plaintiff being an employee covered by said act, it would seem that he is precluded from bringing this action because of the act's exclusiveness of liability provision. This provision is rather emphatic and provides:

> The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . on account of such injury or death . . . .
>
> 33 U.S.C.A. § 905.

In spite of this clear, unequivocal pronouncement, however, we are taught the perils of relying on the literal wording of congressional enactments by a number of cases teaching that, under certain conditions, persons covered by this act do have an independent remedy for damages for the failure to supply a seaworthy ship. *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 66 S. Ct. 792, 90 L. Ed. 1099 (1946), is a landmark case in this regard.

In *Sieracki*, a stevedore employed by an independent stevedoring firm was injured while working aboard ship. Said stevedore was engaged in loading and unloading this ship when the accident occurred, and he brought suit against the ship's owner who was not his employer. The court held that the doctrine of unseaworthiness is not confined to seamen, but this doctrine extended to all workers "performing the ship's service". 90 L. Ed. at 1106. In so holding, the court noted that:

> Historically the work of loading and unloading is the work of the ship's service, performed until recent times by the members of the crew.

Id. at 1107.

The court further noted:

> It is that for injuries occurring while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections. . . . For these

> purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards. . . . [h]is employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the service of the ship.

Id. at 1108-1109.

As to the exclusiveness of liability provision in the Longshoremen's and Harbor Workers' Act, the court stated that said act "did not purport to make the stevedore's remedy for compensation against his employer exclusive of remedies against others". "We may take it therefore," said the court, "that Congress intended the remedy of compensation to be exclusive as against the employer" but not against a third person. *Id.* at 1110. This limitation, however, soon disappeared, for in *Reed v. Steamship Yaka*, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448 (1963), the court held that the Longshoremen's Act and the exclusiveness of liability provision contained therein did not bar a longshoreman from suing his employer, as well as a third person, for unseaworthiness. See also, *Jackson v. Lyles Steamship Company*, 386 U.S. 731, 87 S. Ct. 1419, 18 L. Ed. 2d 488 (1967).

Nor has the court's ruling in *Sieracki* been limited to longshoremen participating in the loading and unloading of a ship, for in *Pope and Talbot, Inc., v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953), the injured plaintiff was a carpenter employed to make

"minor repairs" on the grain loading equipment of a ship. The court expressly rejected the shipowner's argument that as the plaintiff was not a longshoreman and was not engaged in the act of loading the vessel and that the unseaworthiness doctrine was not applicable. The court stated:

> Sieracki's legal protection was not based on the name "stevedore" but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. . . . [the plaintiff's] need for protection from unseaworthiness was neither more or less than that of the stevedores then working with him on the ship or of seamen who have been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law.
>
> 98 L. Ed. at 152-153.

The court had occasion to again consider the doctrine of unseaworthiness in *United N.Y. and N.J. Pilots Association v. Halecki*, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959). In *Halecki*, the vessel while undergoing its "annual overhaul" required work on its generators. The job on said generators required spraying with a toxic compound and was performed while there was no crew aboard. The plaintiff conducted the spraying and died later of poisoning. On the applicability vel non of the doctrine of unseaworthiness to this plaintiff, the court stated that:

> The work that he did was in no way "the type of work" traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was "dead" with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment. . . . [not] connected with a ship's seagoing operations.
>
> * * *
>
> To extend liability for unseaworthiness to the decedent here would distort the law of Mahnich, of Hawn and of Sieracki beyond recognition.
>
> *Id.* at 544-545.

Thus, in determining whether one other than a seaman is entitled to the protection and benefits of the doctrine of unseaworthiness, a fact of controlling importance is the character of the work being performed. If it is established that the work performed by one seeking to maintain an action for unseaworthiness is in the "ship's service," i.e., work which is traditionally the work of crew members of a vessel, then the unseaworthiness doctrine is available — the exclusiveness of liability provision of the Longshoremen's Act notwithstanding. In categorizing particular types of work as that traditionally of a crew, several factors are considered. The nature of the work itself, of course, is of paramount importance. But, collaterally, the courts also consider the status of the vessel upon which the work is being performed. Generally speak-

ing, extraordinary repairs to a ship — such as major overhauls or major reconstruction — have been categorized as work *not* traditionally that of the crew or not in the "ship's service". For example, in *Berryhill v. Pacific Far East Line*, 238 F.2d 385 (9 Cir. 1956), the court noted that "not all repairs are 'ship's work' to be performed historically or currently by the crew . . .". 238 F.2d at 387. The court in *Berryhill* further stated that "the repairs [there involved] were nothing of an improvised, hurried nature, done to save the ship work time, but were of sufficient importance to cause the ship to be dry-docked". *Ibid.* In *Halecki*, supra, the court's refusal to apply the doctrine of unseaworthiness was bottomed on the fact that the work there involved could not be performed while the vessel was at sea, but said work could only be accomplished on a "dead" ship. Additionally, the court in *Halecki* noted that the work there called for the skill of a specialist *with special equipment*. Regarding major repair work on a ship and the status of the repairmen, it has been stated that:

> Obviously there must be some limit, else the whole fabrication of a new ship would be included [within the *Sieracki* rule]. We can only say that the reconstruction of a ship was not traditionally the task of the crew.
>
> *Berge v. National Bulk Carriers Corporation*, 251 F.2d 717, 718 (2 Cir. 1958).

In *West v. United States*, 361 U. S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161 (1959), the court refused to extend the doctrine of unseaworthiness where the "undertaking was not 'ship's work' but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a ship repair contractor and docked at its pier . . .". 4 L. Ed. 2d at 165.

In *Union Carbide Corporation v. Goett*, 256 F.2d 449 (4 Cir. 1958), the court held that an employee injured while sandblasting the deck surface of a barge which was at that time located on a repair dock was not entitled to the protection traditionally afforded seamen. In so holding, the court noted that said barge was not, at the time of the injury, subject to any of the perils of navigation, a prerequisite to the maintenance of an action based on unseaworthiness. In *Raidy v. United States*, 252 F.2d 117 (4 Cir. 1958), a shipyard worker sustained an injury while employed aboard defendant's vessel while in dry dock for major repairs. The court found that the character of work there was not customarily that of a crew since the ship was in dry dock for work which could not have been performed by the crew (which had at that time been discharged) and the ship at the time of the accident was not subjected to the perils of navigation. In *Warren v. Pacific Inland Navigation Company*, 204 F. Supp. 31 (D.C. Ore. 1962), a welder employed by a repair company to conduct extensive repairs on an unmanned steel barge in dry dock was injured when a ladder on which he had been standing slipped. He was denied the benefits of the doctrine of unseaworthiness by the court which

noted that the barge was not subject to any perils of navigation, that it had no navigation equipment and that it had been withdrawn from navigation for the purpose of making the changes.

In the present case, by uncontradicted affidavit, it is established that the repairs being conducted by the defendant to Barge K.C.B. 300 were the following: a section of the top knuckle, starboard side, was cropped out and renewed; two patches were fitted and welded on the port side of the bottom knuckle; three timberhead doublers were gouged off and renewed; one timberhead was reworked and cracks, both below and above the water line, were welded as needed. It is undisputed that at the time of his injury the plaintiff, who was employed as a welder and fitter, was engaged in making such repairs to this barge. It is also asserted that in order to do this work it was necessary that the barge be completely removed from the water. This fact also is not in dispute.

Thus, on the basis of this record, the following can be concluded: The plaintiff was engaged in repairs of such a character as to require the complete removal of Barge K.C.B. 300 from the water; these repairs could not have been performed at sea; special equipment unrelated to the barge's seagoing operations was required to accomplish these repairs; the assistance of the regular crew was not called upon; the barge upon which the repairs were being performed (and the dry dock, too, for that matter) was, during the course of said repairs, not subject to any of the perils of navigation; neither the barge nor the dry dock had at the

time of plaintiff's injury crew members aboard to assist in navigation and the repairs themselves involved replacement of or repair to major portions of the barge. Looking to the character of the work being performed by the plaintiff, it seems clear, and the court so holds, that he was at the time of his injury not engaged in work traditionally that of a seaman. Therefore, it follows that he is not one to whom the doctrine of unseaworthiness is available. Plaintiff having an adequate remedy under the Longshoremen's Act and not being one who can avoid its exclusiveness of liability provision, the present action based on unseaworthiness must fail.

In light of what has been said, it is not necessary to reach or deal with the other contentions of defendant.

There is no genuine issue as to any material fact, and defendant is entitled to judgment forthwith [Rule 56(c), Federal Rules of Civil Procedure], which will be rendered by separate order.

This the 14th day of June, 1968.

(Signed) CLAUDE F. CLAYTON
CLAUDE F. CLAYTON
UNITED STATES
CIRCUIT JUDGE
Sitting by Special Designation
as District Judge

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26550

LOUIS L. ATKINS,
Plaintiff-Appellant,
versus
GREENVILLE SHIPBUILDING CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

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(May 12, 1969)

Before THORNBERRY and DYER, Circuit Judges, and FISHER, District Judge.

DYER, Circuit Judge: Atkins, a shore-based welder and fitter employed on Greenville Shipbuilding Corporation's floating drydock, sustained injuries when a ladder, which he was using to ascend a barge brought onto the drydock for major repairs, slipped causing his fall to the drydock's floor. Although he received com-

pensation from Greenville under the Longshoremen's and Harbor Workers' Compensation Act,[1] Atkins, claiming to be a *Reed v. Yaka*[2] seaman not limited exclusively to the remedies of the Act, sued his employer Greenville for breach of the maritime warranty of seaworthiness, alleging that the floating drydock was a "vessel" and that the ladder was a part of its gear and tackle. Greenville moved for summary judgment on the grounds that no warranty of seaworthiness was owed to Atkins because the floating drydock was not a "vessel" and because Atkins was not doing a seaman's traditional work. The District Court granted the motion upon the latter ground; we affirm on the former.

Greenville Shipbuilding Corporation is engaged in the business of designing, constructing and repairing steel vessels, barges, towboats, floating drydocks and marine vessels at its shipyard on the banks of Lake Ferguson, a navigable waterway near Greenville, Mississippi, on the Mississippi River. As an instrument for the repair of vessels at its Lake Ferguson shipyard, during the years 1961-62 Greenville constructed a floating drydock which since that time has been floating upon the lake's waters, permanently affixed to the bank of the lake. The dock itself, a large flat surface, is lowered from its floating position within a steel frame by pumping water into watertight compartments. Next the vessel to be repaired is situated above it, after which the dock is raised by pumping air into

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[1] 33 U.S.C.A. §§ 901 et seq.

[2] *Reed v The Yaka*, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448.

the compartments. The buoyancy lifts dock and vessel for accessibility to repairmen. The drydock's position is maintained on the waterfront by cables running to the bank. It is in the exact position in which it was placed upon construction, and it was neither designed for nor used for navigation or transportation. The floating drydock is without motive power and could only be moved upon water from one place to another by being towed or by other outside power.

On July 26, 1966, the Barge K.C.B. 300 was placed on the drydock for major repairs to eliminate leaks, requiring among other things removal and replacement of two sections below her waterline and welding of various cracks. This work could only be done by removing the barge from the water.

Atkins, a welder and fitter employed by Greenville, worked on the barge that day. In mid-afternoon he began ascending a ladder leading from the floor, or "dock", of the floating drydock to the barge. The ladder slipped, and Atkins fell to the floor of the drydock, sustaining injuries.

As a result of the accident, Atkins made a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, and since filing the claim has received and accepted benefits of approximately three thousand dollars. On June 30, 1967, Atkins filed his complaint alleging injuries sustained due to the unseaworthiness of a "vessel" owned by Greenville, specifically alleging injuries resulting from a defective and unseaworthy ladder which was part of

the vessel's gear and tackle. Greenville defended the unseaworthiness claim upon the grounds that Atkins was not doing traditional seamen's work and that the floating drydock was not a "vessel". The District Court, finding no material facts to be in dispute, held that Atkins was not engaged in work traditionally that of a seaman and entered summary judgment in favor of Greenville.

Atkins is clearly within the compensation provisions of the Longshoremen's Compensation Act,[3] and Greenville is equally as clearly an employer under the Act.[4] However, Atkins seeks to avoid the Act's exclusiveness of liability section,[5] which quite explicitly would preclude any further recovery against Greenville, the employer, if the section is given its literal meaning. His technique of avoidance is manipulation of the doctrine of seaworthiness, which as amplified by *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, and its progeny, *Ryan Stevedoring Co. v. Pan-*

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[3] The Act provides that compensation shall be payable "if the disability or death results from an injury occurring upon the navigable waters of the United States *(including any dry dock)* . . . . 33 U.S.C.A. § 903(a) (emphasis added). *See Avondale Marine Ways, Inc. v. Henderson*, 1953, 346 U.S. 366, 74 S.Ct. 100, 98 L.Ed. 77; *Travelers Insurance Company v. Shea*, 1967, 382 F.2d 344, 347-48.

[4] 33 U.S.C.A. § 902(4) provides that an "employer" under the Act is an employer "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States *(including any drydock.)* [Emphasis added.]

[5] 33 U.S.C.A. § 905 provides in pertinent part:

> The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury . . . .

Atlantic S.S. Corp. 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133; *Reed v. The Yaka,* 1963, 373 U.S. 410, 83 S.Ct 1349, 10 L.Ed.2d 448; *Jackson v. Lykes Bros. Steamship Co.,* 1967, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488, has resulted in metastasis, if not emasculation, of the Act's exclusiveness of remedies provision. In *Sieracki* the Supreme Court extended the scope of the maritime warranty of seaworthiness in favor of shore-based employees, including longshoremen, engaged aboard a vessel in work customarily or traditionally performed by seamen, thus allowing longshoremen under the Act to recover against third persons. *Reed* and *Jackson* extended the *Sieracki* extension to allow longshoremen, independently of the Act or its exclusiveness of remedies provision, to recover directly from their employers for injuries resulting from unseaworthiness where the employer is the owner of or has an operational interest in the vessel.

However, regard for the historical development of the warranty of seaworthiness and appreciation of the influences upon its development, from *The Osceola,* 1903, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, through *Sieracki, Reed* and *Jackson,* reveals that Atkins cannot so easily ensconce himself within the expanded scope of the warranty. With the advent of an increasingly complex and dangerous maritime service it was held that the owners owed to the seaman the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition. *The Osceola, supra. See The State of Maryland,* 4 Cir. 1936, 85 F.2d 944. In *Sieracki,* by a willingness to recognize substance over form, the warranty was made applicable to those

"doing a seaman's work and incurring a seaman's hazards," *Sieracki, supra* at 99, despite "'the fortuitous circumstance' of their employment by one other than the owner to do the ship's work," or "more modern divisions of labor." *Id.* at 98, 96. Others doing a seaman's traditional work have been included within the warranty. *E.g., Pope & Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143. In addition to expanding the class of persons covered by the warranty, due to the emergence of special purpose craft, the vessels owing the warranty in recent years also have become more diverse; again through recognition of substance over form. *See Offshore Company v. Robison*, 5 Cir. 1959, 266 F.2d 769.

But despite expansions of the warranty because of the technical progress of the modern maritime service, tradition plays an important role. While the *Sieracki, Reed* and *Jackson* decisions in one sense expanded the scope of the warranty, implicit within their rationale is the limiting factor of tradition. The limitation requires that the injured shore-based worker be engaged in work traditionally that of a seaman, *United N.Y. and N.J. Pilots Association v. Halecki*, 1959, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed.2d 541, excluding those persons performing such tasks as making major repairs requiring drydocking or special skills. *See West v. United States*, 1959, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed. 2d 161; *Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Service*, 5 Cir. 1967, 377 F.2d 511, *Union Carbide Corporation v. Goett*, 4 Cir. 1958, 256 F.2d 449; *Berge v. National Bulk Carriers Corporation*, 2 Cir. 1958, 251 F.2d 717; *Berryhill v. Pacific Far East Line*, 9 Cir.

1956, 238 F.2d 385. By the same token, the craft or structure said to owe a warranty of seaworthiness must fall within the traditional category of "vessels". *Cf. Offshore Company v. Robison, supra* at 781.

Concentrating upon Atkins' duties in making major repairs to the barge placed on the drydock, the District Court held that Atkins was not engaged in work traditionally that of a seaman, hence denying recovery because he was outside the class of persons within the warranty's coverage. In doing so the District Court deemed it unnecessary to decide whether the floating drydock was a "vessel" owing a warranty of seaworthiness. We disagree with that approach.

In view of this Court's decision in *Offshore Company v. Robison, supra,* the initial determination must be whether the craft or structure upon which the shore-based worker was injured is a "vessel" owing a warranty of seaworthiness. Only following a determination that the craft or structure is a "vessel" does it become necessary to decide whether the worker's duties were those traditionally performed by seamen, *Halecki, supra,* or in the case of unconventional specialty craft, duties contributing to the accomplishment of the vessel's mission, *Offshore Company v. Robison, supra,* in which case the warranty of the vessel's seaworthiness would be owing to the plaintiff.

Although the District Court made no determination whether the floating drydock *sub judice* was a "vessel" owing a warranty of seaworthiness, since no material facts are in dispute as to the nature, purpose or charac-

ter of the structure this Court may make that determination. The appellant contests only the ultimate fact whether a floating drydock is a special purpose vessel owing a warranty of seaworthiness, not whether the floating drydock was in fact a floating drydock, and contends that the ultimate determination can only be made by a jury. We disagree and hold as a matter of law that the floating drydock *sub judice* was not a "vessel" owing a warranty of seaworthiness.

Since *Cope v. Vallette Dry Dock Company*, 1887, 119 U.S. 625, 7 S.Ct. 417, 30 L.Ed. 501, if not before, *Snyder v. A Floating Dry Dock*, D.N.J. 1884, 22 F. 685, it has been clear that a floating dry dock is not a "vessel". *Cope v. Vallette Dry Dock Company, supra*, held that a floating drydock was not a "vessel" for purposes of salvage. The same considerations are applicable to whether a warranty of seaworthiness is owed. "A fixed structure such as this dry-dock is, not used for the purpose of navigation, is not a subject of salvage service, any more than is a wharf or a warehouse when projecting into or upon the water." *Cope, supra* at 627. Mere flotation on water does not constitute a structure a "vessel" for purposes of salvage nor warranty of seaworthiness. The element of risk and exposure to the hazards of the sea, necessary for the operation of and common to both principles, is absent upon floating drydocks. *Compare Cope v. Vallette Dry Dock Co., supra* at 627-29, *with Seas Shipping Co. v. Sieracki, supra* at 93-95, 99. While ordinarily "attempts to fix unvarying meanings [that] have a firm legal significance to such terms as 'seaman', 'vessel', 'member of a crew' must come to grief on the facts," *Offshore Company v.*

Robison, supra at 779, no particular difficulties are here presented.

We find nothing in *Producers Drilling Company v. Gray*, 5 Cir. 1967, 361 F.2d 432, or *Bernardo v. Bethlehem Steel Company*, 2 Cir. 1963, 314 F.2d 604, which requires departure from the settled rule that a floating drydock is not a vessel. The former dealt with a barge, which it is well settled may be a vessel, *Producers Drilling, supra* at 435, and in *Bernardo* the Court was not called upon to make the determination we here make. *Supra* at 608.

AFFIRMED.

APPENDIX C

SUPPLEMENTAL INDEX

Q. Now, this is a floating structure, is it not?
A. Right. This on the inboard side, or the side toward the bank, we have an old government quarter boat — I don't know whether you are familiar with those boats.
Q. Now, referring to the dry dock, you can move this from place to place, can you not, by the use of tugs?
A. By using outside power.
Q. It could be moved from one mooring to another mooring?
A. Right.
Q. And, in the course of moving it from one mooring to another mooring, of course it would be

possible to move with it anything that happened to be aboard? In other words, if you had workmen aboard it, if you had vessels aboard it, or if you had anything else aboard it, they could be moved right along with the dry dock from one place to another, if you wanted to?

A. If you had enough power, yes.

Q. If you had the power. Wouldn't it also be possible if you wished to do so, to construct living quarters above the dry dock, if you wanted to have them there — ignoring whether it is customary to do it or not, if you wished to construct it?

A. It wouldn't be practical, because it would cut down on your work space.

Q. Conceding that, Mr. Mason, if you did wish for any particular reason to have living quarters aboard it, you could construct it, couldn't you?

A. You could build it, if you wanted to put it on there, yes, but it would, like I say, cut down on your work space.

Q. It wouldn't operate as efficiently as it operates the way you have it drawn?

A. That's right.

Q. And this dry dock, of course, is used exclusively for the repair and for working on vessels?

A. That's right.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 437

LOUIS L. ATKINS,
Petitioner,

vs.

GREENVILLE SHIPBUILDING CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

Table of Authorities II

Introduction 1

Opinions Below 2

Jurisdiction 2

Statutes Involved 3

Questions Presented 4

Statement of the Case 4

Reasons for Denying Certiorari—

(a) The Decision of the Court of Appeals Does Not Conflict With the Decision of the U. S. Court of Appeals for the Second Circuit in Bernardo v. Bethlehem Steel Company 5

(b) The Question of Whether or Not a Floating Dry Dock Was a "Vessel" Was Resolved by This Court as Early as 1887 and Has Not Been Disturbed Since 9

(c) Nothing Contained in the Opinion of the Court of Appeals Conflicts with the Doctrine of Reed v. YAKA 10

(d) The Doctrine of Reed v. YAKA Is Inapplicable to Drydock Workers and Petitioner's Theory Would Create an Arbitrary Distinction in the Law of the Sort This Court Sought to Eliminate in Reed v. YAKA 13

Table of Authorities

CASES

Avondale Marine Ways, Inc. v. *Henderson*, 346 U.S. 366, 74 S.Ct. 100, 98 L.Ed. 77 (1953) 12, 17, 19

Bernardo v. *Bethlehem Steel Company*, 169 F. Supp. 914 (S.D.N.Y., 1959), 200 F. Supp. 534 (S.D.N.Y., 1961), affirmed 314 F. 2d 604 (2 Cir., 1963) 5, 6, 7, 8

Berton v. *Tietjen & Lang Dry Dock Co.*, 219 Fed. 763 (D.N.J., 1915) 9

Cope v. *Vallette Dry Dock Company*, 119 U.S. 625, 7 S.Ct. 417, 30 L.Ed. 501 (1887) 9

DeMartino v. *Bethlehem Steel Company*, 235 F. Supp. 569 (D. Md., 1964) 9

Jackson v. *Lykes Bros. Steamship Co.*, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488 (1967) 10, 16

Offshore Co. v. *Robison*, 266 F.2d 769 (5 Cir., 1959) 18

Perry v. *Haines*, 191 U.S. 17, 24 S.Ct. 8, 48 L.Ed. 73 (1903) 9

Pope & Talbot, Inc. v. *Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953) 16

Producers Drilling Co. v. *Gray*, 361 F.2d 432 (5 Cir., 1967) 18, 19, 20

Reed v. *YAKA*, 373 U.S. 410, 83 S. Ct. 1349, 10 L.Ed.2d 488 (1963) 1, 2, 5, 10, 13, 14, 15, 16, 17, 18

Ryan Stevedoring Co. v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956) 10, 14

San Cristobal, The, 215 Fed. 615 (S.D. Ala., 1915), affirmed 230 Fed. 599 (5 Cir., 1916) 9

Seas Shipping Co. v. *Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) 10, 14

Snyder v. *A Floating Dry Dock*, 22 Fed. 685 (D.N.J., (1884) 9

Thibodeaux v. *J. Ray McDermott & Co.*, 276 F.2d 42 (5 Cir., 1960) 8

United States v. *Bethlehem Steel Company*, 235 F. Supp. 569 (D. Md., 1964) 9

Warfield, The, 120 Fed. 847 (E.D.N.Y., 1903) 9

CONSTITUTION

United States Constitution, Article III, §2, cl. 1 2

STATUTES

Jones Act, 46 U.S.C.A. §688 ..... 6, 7, 8, 18
Judicial Code, 28 U.S.C.A. §1254(1) 2
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§901 et seq. 3, 5, 13, 14, 15, 16, 17

OTHER AUTHORITIES

Benedict on Admiralty, (6th Ed., 1340) §54 9
Gilmore and Black, *The Law of Admiralty* (1857) §1-11 10
Norris, *Maritime Personal Injuries* (2d Ed., 1966) §23 9-10
Norris, *The Law of Seamen* (2d Ed., 1962) §9 10
Robinson on Admiralty, (1939) §8 10
2 Am. Jur. 2d, *Admiralty*, §34 10
2 C.J.S., *Admiralty*, §18b 10

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INTRODUCTION

This case involves an attempt by Petitioner to extend the doctrine of *Reed* v. *YAKA*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963), far beyond anything contemplated by this Court when that case was decided. Recognizing that this case was a far cry from being within the

scope of *Reed* v. *YAKA*, both the United States District Court for the Northern District of Mississippi and the United States Court of Appeals for the Fifth Circuit rejected Petitioner's contentions. Here the Court of Appeals has not rendered a decision in conflict with the decision of another Court of Appeals on the same matter, nor has the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court. Rather, the Court of Appeals' decision rests upon a doctrine enunciated by this Court in 1887 and undisturbed by this or any other court in eighty-two years. There being no special or important reasons for the granting of this Petition for Certiorari, Respondent respectfully submits that the Petition should be denied.

OPINIONS BELOW

The United States District Court for the Northern District of Mississippi rendered an opinion on June 14, 1968 granting summary judgment for Respondent. This opinion is reprinted as Appendix A to the Petition for a Writ of Certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the District Court was handed down on May 12, 1969 and is reprinted as Appendix B to the Petition for a Writ of Certiorari. Neither of these opinions has yet been reported in the Federal Reporter, Second Series, or the Federal Supplement.

JURISDICTION

Original federal jurisdiction of this cause was predicated upon the general maritime law of the United States. United States Constitution, Article III, Section 2, Clause 1. This Court has discretion as to whether or not it will review this case under the authority granted in Section 1254(1), Title 28, United States Code.

STATUTES INVOLVED

Section 903, Title 33, United States Code:

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

Section 905, Title 33, United States Code:

The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was

caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

QUESTIONS PRESENTED

Petitioner has not formally presented any specific questions for consideration by the Court. Respondent would assume that the following questions are implicitly presented by the Petition filed in this case:

(1) Whether or not, under the facts in this case, Respondent's floating dry dock was a "vessel."

(2) Whether or not, under the facts in this case, at the time of his alleged accident Petitioner was engaged in duties traditionally performed by seamen.

(3) Whether or not, when either question (1) or (2) is answered adversely to Petitioner, under the facts of this case, the exclusiveness of liability provisions of the Longshoremen's and Harbor Workers' Compensation Act constitute a bar to a civil action based on unseaworthiness.

(4) Whether or not, when there is no genuine issue as to any material fact, the above questions can be decided on a motion for summary judgment.

STATEMENT OF THE CASE

Petitioner, Louis L. Atkins, filed this suit alleging the unseaworthiness of a floating dry dock owned by Respondent and a causal connection between such alleged unseaworthiness and personal injuries which he sustained on or about July 26, 1966. Prior to the date of his injury, Petitioner had been employed as a welder on board said floating dry dock, which was securely moored to the banks of Lake Ferguson, a navigable body of water in Greenville, Mississippi.

Respondent answered the suit alleging, among other things, that Petitioner was a longshoreman within the meaning of the Longshoremen's and Harbor Workers' Compensation Act and that Respondent was an employer within the meaning of that Act. Respondent further alleged that the injury or accident occurred on a dry dock which would clearly bring the case within the express language of the Longshoremen's Act. 33 *U.S.C.A.*, §903. Recognizing that *Reed* v. *YAKA, supra,* had created an exception to the ordinary exclusiveness of liability provisions of the Longshoremen's Act, Respondent further alleged that at the time of his accident and injury, Petitioner was not on board any "vessel" nor was he engaged in duties traditionally performed by seamen.

After development of the facts through various discovery procedures, Respondent moved for summary judgment. The District Court granted summary judgment and, on appeal, the United States Court of Appeals for the Fifth Circuit affirmed.

REASONS FOR DENYING CERTIORARI

(a) The Decision of the Court of Appeals Does Not Conflict with the Decision of the U. S. Court of Appeals for the Second Circuit in Bernardo v. Bethlehem Steel Company.

Petitioner argues, as his primary reason why this Court should grant certiorari, that the Court of Appeals' decision in the instant case is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit in *Bernardo* v. *Bethlehem Steel Company,* 314 F.2d 604 (2 Cir., 1963). With all due respect, Respondent submits that there is absolutely no conflict between the decision of the Court of Appeals for the Fifth Circuit here and the decision of the Court of Appeals for the Second

Circuit in *Bernardo*. Respondent submits that the Court of Appeals in the instant case was correct in noting the absence of such a conflict as Petitioner here urges (See Appendix B to Petition for Certiorari, p. 31).

At the outset, it is important to note that the instant case is predicated upon the general maritime law and is a suit based upon the alleged unseaworthiness of a would-be "vessel". *Bernardo*, on the other hand, was a suit based upon the Jones Act, 46 *U.S.C.A.*, §688, and upon a number of other theories of recovery.

The *Bernardo* case has a long history. See *Bernardo* v. *Bethlehem Steel Company*, 169 F. Supp. 914 (S.D.N.Y., 1959), on Defendant's motion for summary judgment; and *Bernardo* v. *Bethlehem Steel Company*, 200 F. Supp. 534 (S.D.N.Y., 1961), on Plaintiff's motion for judgment notwithstanding the verdict. With respect to the opinion of the Court of Appeals in *Bernardo*, which Petitioner here points to as being in conflict with the decision of the Court of Appeals in the instant case, we would point out that the situation in *Bernardo* was procedurally the opposite of our case. In *Bernardo*, the District Court jury had found that the dry dock was not a "vessel" and had returned a verdict accordingly. On appeal Plaintiff was attacking the jury verdict on the ground that the dry dock should have been held to be a vessel as a matter of law. In this posture, the Court of Appeals naturally concerned itself with whether or not there was sufficient evidence in the record to support the jury finding that the dry dock was not a vessel. The holding of the Court of Appeals in *Bernardo* was that there was an evidentiary basis in the record to support the verdict of the jury. The language in the *Bernardo* opinion of the Court of Appeals which Petitioner says is in conflict with the holding below in the instant case is pure dicta.

The Court of Appeals in *Bernardo* stated that, because of the procedural posture of the case, the position of the Defendant before trial and verdict, that as a matter of law the dry dock was not a vessel, was not properly before the Court for decision. Therefore, the Court stated that it was not passing on this argument advanced by Defendant but instead was merely holding that the verdict of the jury should not be disturbed. 314 F.2d at 608. Thus, the Court of Appeals in the instant case was quite correct in noting that "In *Bernardo* the Court was not called upon to make the determination we here make." Appendix B to Petition for Writ of Certiorari, p. 31.

The District Court in *Bernardo* emphasized that the denial of summary judgment there was based upon the inherent discretion of the Court in passing upon such motions. 169 F. Supp. at 917. There, a number of theories of recovery were advanced by Plaintiff, some based upon state law, and some based upon federal law. In denying summary judgment the District Court stated that

> "Summary judgment may be denied in the exercise of sound discretion where a portion of an action ripe for summary judgment 'is intertwined with another claim that must be tried . . .'." 169 F. Supp. at 917.

Here, Petitioner sued only on the theory of unseaworthiness. In *Bernardo,* the plaintiff sued under the Jones Act, under the general maritime law for unseaworthiness, and under the common law for negligence. The Court noted that the "omnibus complaint advances about as many theories of liability as could be thought of". 169 F. Supp. at 916. In the instant case the complications which prompted the District Court in *Bernardo* to exercise its discretion and deny summary judgment are not present.

It is also important to point out that when *Bernardo* was before the Court on motion for summary judgment, it

appeared from the record before the Court on that motion that the Plaintiff alternated in working on the various dry docks owned by Defendant and on board various vessels owned and/or controlled by Defendant. 169 F. Supp. at 916. This evidence clearly presented an issue of fact on the question of whether or not Plaintiff was a member of the crew of a vessel, thus precluding summary judgment. In the case now before this Court, however, neither the District Court nor the Court of Appeals found any such issue of fact. Here it is uncontradicted that the Petitioner never worked on a vessel. All of his time was spent on the dry dock and on shore in the shipyard.

Further, the District Court in *Bernardo* recognized the vitality of such decisions of the United States Court of Appeals for the Fifth Circuit as *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42 (5 Cir., 1960), and expressly held that the rule, that Jones Act cases must be submitted to a jury,

> "Is not absolute, and in certain cases it is still possible for the Court to direct the verdict where the evidence clearly resolved the issues in favor of either side." 200 F. Supp. at 537.

Of course, summary judgment is also available where there is no genuine issue as to any material fact in a maritime personal injury action.

All of this history of the *Bernardo* case makes it clear that there is nothing in *Bernardo* which is in conflict with the holding of the United States Court of Appeals for the Fifth Circuit below. For that reason, there is no conflict between the Circuits which would support a grant of this petition for a writ of certiorari.

(b) The Question of Whether or Not a Floating Dry Dock Was a "Vessel" Was Resolved by This Court As Early As 1887 and Has Not Been Disturbed Since.

Petitioner objects strenuously to the holding by the United States Court of Appeals for the Fifth Circuit that as a matter of law a floating dry dock is not a "vessel". Respondent respectfully submits that the holding of the Court of Appeals here is completely sound, and furthermore, that there is no reason for this Court to review that holding because of the fact that this Court is already firmly on record in support of that holding. *Cope* v. *Vallette Dry Dock Company,* 119 U.S. 625, 7 S.Ct. 336, 30 L.Ed. 501 (1887).

Respondent has thoroughly researched the case law on the question of whether or not a dry dock is a "vessel". We have found numerous cases and authorities dealing with this question and these cases have arisen in a wide variety of contexts, and have construed the provisions of several statutes. In none of these cases, however, has any Court suggested that a dry dock should be considered a vessel. They all hold that a dry dock is not a vessel.

The following authorities support the proposition that a dry dock is not a "vessel". *Cope* v. *Vallette Dry Dock Company, supra*; *Perry* v. *Haines,* 191 U.S. 17, 24 S.Ct. 8, 48 L.Ed. 73 (1903); *Snyder* v. *A Floating Dry Dock,* 22 Fed. 685 (D.N.J., 1884); *The Warfield,* 120 Fed. 847 (E.D.N.Y., 1903); *The San Cristobal,* 215 Fed. 615 (S.D.Ala., 1914), affirmed, 230 Fed. 599 (5 Cir., 1916); *Berton* v. *Tietjen & Lang Dry Dock Co.,* 219 Fed. 763 (D.N.J., 1915); *DeMartino* v. *Bethlehem Steel Company,* 164 F.2d 177, 179 (1 Cir., 1947); *United States* v. *Bethlehem Steel Company,* 235 F. Supp. 569 (D.Md., 1964); *1 Benedict on Admiralty* (6th ed., 1940), §54, p. 115, fn. 21; Norris, *Mari-*

time Personal Injuries (2d ed., 1966), §12, p. 23; 1 Norris, *The Law of Seamen* (2d ed., 1962), §9, p. 14; Gilmore and Black, *The Law of Admiralty* (1957), §1-11, pp. 29-30; *Robinson on Admiralty* (1939), §8, p. 45; 2 C.J.S., *Admiralty*, §18b; 2 Am. Jur. 2d, *Admiralty*, §34.

All of the above authorities, when coupled with the decision of the Court of Appeals below, make it abundantly clear that a floating dry dock simply is not within the legal definition of a "vessel". This matter being so well settled, Respondent respectfully submits that further consideration of the question by this Court is unnecessary.

(c) Nothing contained in the opinion of the Court of Appeals Conflicts with the Doctrine of Reed v. Yaka.

In *Reed* v. *YAKA*, *supra*, this Court held that a shore-based worker engaged in seaman's work could sue his employer under the doctrine of unseaworthiness for injuries proximately caused by any unseaworthy condition in an employer-owned vessel. Petitioner argues in his petition that the Court of Appeals' decision below was contrary to the holding of *Reed* v. *YAKA*, and that therefore this Court should grant certiorari and reverse, presumably as it did in *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488 (1967).

A review of the facts in this case makes it immediately apparent that Petitioner's reliance upon *Reed* v. *YAKA* is misplaced. A study of the history of the *Reed* v. *YAKA* doctrine is necessary to a proper understanding of the contours of that doctrine. See *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946); and *Ryan Stevedoring Co.*, v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956). An examination of these cases makes it clear that before a longshoreman may come within the doctrine of *Reed* v. *YAKA*, he must establish (1)

that he was working on board an employer-owned "vessel", the unseaworthiness of which proximately caused or contributed to his injuries, and (2) that at the time of his injuries he was engaged in work traditionally that of a seaman. Factually, Petitioner passes neither test in this case.

The dry dock with which we are here concerned was built and constructed by Greenville Shipbuilding Corporation at its shipyard during the years 1961 and 1962. This dry dock is situated on Lake Ferguson adjacent to the banks of Lake Ferguson. Its position is maintained on the waterfront by cables running from said floating dry dock to the bank of Lake Ferguson. This floating dry dock is now situated in the exact position in which it was placed when construction of it was completed, and said dry dock has never been moved from such position since that time. Further, this dry dock was neither designed for, nor has it been used for, navigation or commerce upon the waterways of the United States. The dry dock is without power to propel itself and could be moved from one place to another only by being towed by some vessel or through power supplied from an outside source.

The dry dock is a steel framed structure of the type commonly used in making repairs upon vessels, towboats, barges, etc. The dock itself, which is a large flat surface resembling a floor, can be lowered and raised within the steel frame. When water is pumped into the watertight compartments of the dock, the dock is lowered below the surface level of the water. This is done so that the particular vessel to be repaired may be moved into place. Once such vessel is situated within the frame directly above the submerged dock, the water is pumped out of the compartments and buoyancy of the dock raises the vessel. Once the dock has been raised in this manner and the vessel to be repaired has been lifted out of the water, the vessel becomes accessible to the repairmen for their work.

This structure sounds very little like anything even remotely resembling a "vessel". The United States Court of Appeals for the Fifth Circuit below held, as a matter of law, that this floating dry dock was not a vessel. Compare *Avondale Marine Ways, Inc.* v. *Henderson*, 346 U.S. 366, 74 S.Ct. 100, 98 L.Ed. 77, 79 (1953) (concurring opinion). There being no "vessel" in the picture, there was nothing to be unseaworthy. There being no object the unseaworthiness of which would give rise to a cause of action, Petitioner does not fall within *Reed* v. *YAKA*.

Turning now to the type of work being done by Plaintiff, the District Court accurately characterized that work as follows:

> "The Plaintiff [Petitioner] was engaged in repairs of such a character as to require the complete removal of the Barge K.C.B. 300 from the water; these repairs could not have been performed at sea; special equipment unrelated to the barge's seagoing operations was required to accomplish these repairs; the assistance of the regular crew was not called upon; the barge upon which the repairs were being performed (and the dry dock, too, for that matter) was, during the course of said repairs, not subject to any of the perils of navigation; neither the barge nor the dry dock had at the time of Plaintiff's injury crew members aboard to assist in navigation and the repairs themselves involved replacement of or repair to major portions of the barge. Looking to the character of the work being performed by Plaintiff, it seems clear, and the Court so holds, that he was at the time of his injury not engaged in work traditionally that of a seaman. Therefore, it follows that he is not one to whom the doctrine of unseaworthiness is available. Plaintiff having an adequate remedy under the Longshoreman's Act, and not being one who can avoid its exclusiveness of liability provision, the present action based on unseaworthiness must fail." Appendix A to Petition for Writ of Certiorari, pp. 21-22.

Under these facts, it is respectfully submitted that the District Court properly held that Petitioner was not engaged in work traditionally that of a seaman. The Court of Appeals did not pass upon that issue, which amounts to nothing more than a question of how one characterizes the undisputed facts of this case. It is respectfully submitted, therefore, that review of those facts by this Court is unwarranted.

(d) The Doctrine of Reed v. YAKA Is Inapplicable to Drydock Workers and Petitioner's Theory Would Create an Arbitrary Distinction in the Law of the Sort This Court Sought to Eliminate in Reed v. YAKA.

In addition to what has already been said above, there is still another reason why the decision below is not in conflict with this Court's decision in *Reed* v. *YAKA, supra.* In fact, it is submitted that even though this Court might conclude that the floating dry dock upon which Petitioner was injured was a "vessel" and even though this Court might conclude that Petitioner, at the time of his injury, was engaged in duties traditionally those of a seaman, this case is still not brought within the scope of the policy of *Reed* v. *YAKA* and is still barred by the Longshoremen's and Harbor Workers' Compensation Act. On this basis, and even though this Court might disagree with the Court of Appeals' holding that the dry dock was not a vessel, and even though this Court might disagree with the District Court's holding that Petitioner was not engaged in duties traditionally those of a seaman, it is respectfully submitted that the decision in this case is not in conflict with any decision of the Supreme Court. Accordingly, Petitioner's assertion that this Court must grant certiorari in order to conform the decision in the instant case to *Reed* v. *YAKA* is in error.

The following analysis of *Reed* v. *YAKA* will support the above conclusions. Reed was a longshoreman who was injured on board the S.S. YAKA, which was under the control of his employer as owner pro hac vice. Reed filed his libel in rem against the vessel to recover injuries he sustained as a result of the unseaworthiness of the YAKA. Pan-Atlantic, Reed's employer, was brought in as one of the defendants. In *Reed* it was admitted that the vessel was unseaworthy and that this unseaworthiness caused the injuries sustained by Reed. The only question before the Court was whether or not the exclusiveness of liability provisions of the Longshoremen's and Harbor Workers' Compensation Act prevented Reed from recovering against his employer. 310 U.S. at 413, 10 L.Ed.2d at 451.

In reaching the result that Reed could maintain the action which he had brought, this Court traced the history of the longshoreman's right to the shipowner's warranty of seaworthiness. First, in *Sieracki*, where the longshoreman was employed by an independent contractor and was not suing his employer, the Court held that the longshoreman was protected by the warranty of seaworthiness and that he could recover for any breach of that warranty. The Court emphasized the fact that like work entitled men to like protection under the doctrine of seaworthiness. Longshoremen became entitled to the warranty of seaworthiness because they did the work of seamen.

Ten years later, in the *Ryan Stevedoring* case, the Court was faced with the second stage of the *Sieracki* situation. The injured longshoreman had recovered against the shipowner, as *Sieracki* had cleared the way for him to do. The shipowner, however, then sued the stevedoring company, the employer of the injured long-

shoreman, by way of indemnity, asserting the provision of the contract between the shipowner and the stevedoring company and asserting a breach of that contract as the cause of the accident in question. The stevedoring company defended on the theory that it could not be held responsible to its own employee under the doctrine of unseaworthiness because of the bar of the Longshoremen's and Harbor Workers' Compensation Act. This Court rejected that argument and held that the shipowner could recover in contract and not in tort against the stevedoring company under that set of circumstances.

All of this leads us to the situation with which the Court was faced in *Reed* v. *YAKA*. There, in the words of this Court,

> "If the petitioner here had been employed to do this particular work by an independent stevedoring company rather than directly by the owner, he could have recovered damages for his injury from the owner who could have then under Ryan shifted the burden of the recovery to petitioner's stevedoring employer." 373 U.S. at 414, 10 L.Ed.2d at 452.

The Court then went on to say

> "We think it would produce a harsh and incongruous result . . ., to distinguish between liability to longshoremen injured under precisely the same circumstances because they draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company." 373 U.S. at 415, 10 L.Ed.2d at 453.

In short, in *Reed* v. *YAKA*, the Court was faced with the situation where one group of longshoremen whose primary duties involved the loading and unloading of ships of non-employers were protected by the warranty

of seaworthiness, while a second group of longshoremen doing exactly the same type of work, were outside of that protection. This, the Court reasoned, was an arbitrary and unjust situation. An injured longshoreman's legal remedies, the Court stated, should not be determined by the signature on his paycheck. "All were subjected to the same danger. All were entitled to like treatment under law." 373 U.S. at 415, 10 L.Ed.2d at 453, citing *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 413, 74 S.Ct. 202, 98 L.Ed. 143, 152 (1953).

In *Reed* v. *YAKA,* the Court found an overriding and compelling circumstance which it felt required the ignoring of the literal working of the exclusiveness of liability provisions of the Longshoremen's and Harbor Workers' Compensation Act. That compelling situation was the distinction theretofore existing in the law between the remedies of longshoremen who were employed by the owner of the vessel on which they were injured and the remedies of longshoremen not employed by the owners of the offending vessel. When Reed brought his action against his employer, the Court was aware of the fact that thousands of longshoremen around the country already had, in the event of an injury, a right of action based on unseaworthiness. The question was whether or not Reed had a similar legal remedy. The Court correctly held that he did. That holding was reaffirmed, but in no way extended, by this Court in *Jackson* v. *Lykes Bros. Steamship Co., supra.*

In this case, this Court is concerned with dry dock workers working on dry docks of various types. As noted earlier in this brief, there are three basic types of dry docks, the marine railway, the graven dry dock which is within the land, and the floating dry dock. The men who worked upon these three different types of dry docks all

do substantially the same type of work. There is no arbitrary and unreasoned distinction drawn between different groups of dry dock workers. Under the present state of the law, all dry dock workers are already being treated equally, the precise result for which this Court strove and achieved, in *Reed* v. *YAKA*. See *Avondale Marine Ways, Inc.* v. *Henderson, supra*. All dry dock workers injured while engaged in work upon dry docks have a remedy under the Longshoremen's and Harbor Workers' Compensation Act. As the law now stands no dry dock workers of any variety have a right to sue their employers under the general maritime law for the unseaworthiness of the dry dock upon which they are working. Equally, and without distinction, workers on marine railways, on graven dry docks and on floating dry docks are treated alike under the law.

When viewed in terms of the underlying policy considerations of *Reed* v. *YAKA*, it is submitted that the case at bar is entirely different. Here, we are not faced with a situation where the injured worker has been denied certain legal rights that others doing identical work are entitled to. Here, we are not faced with a situation where some people doing the type work done by Petitioner are employed by the owner of the dry dock and others are employed by an independent contractor. It is common knowledge that all workers on dry docks are employed by the owner of the dry dock. When seen in this light, there is simply no "harsh or incongruous result" which has been produced by the decision below. In fact, were certiorari to be granted in this case and were this case to ultimately be reversed, it is submitted that the Court would thereby be creating precisely the same type of arbitrary and unreasoned distinction which it eliminated in *Reed* v. *YAKA*. All dry dock workers are already

being treated alike by the law. Accordingly, there is no inconsistency between the decision below and this Court's decision in *Reed* v. *YAKA* which would justify granting certiorari in this case.

(e) This Court Should Not Consider Alleged Inconsistencies in the Holdings of the United States Court of Appeals for the Fifth Circuit.

Petitioner asserts as an additional ground for the granting of certiorari that the decision below is in conflict with two other decisions of the United States Court of Appeals for the Fifth Circuit. *Offshore Co.* v. *Robison*, 266 F.2d 769 (5 Cir., 1959) and *Producers Drilling Co.* v. *Gray*, 361 F.2d 432 (5 Cir., 1967). The first of those decisions holds that a drilling rig out in the Gulf of Mexico may be held to be a "vessel" by a jury. The second of these cases holds that as a matter of law such drilling rigs are "vessels".

One distinction between *Offshore Co.* and *Producers Drilling* and the instant case is that both of the two decisions relied upon by Petitioner came in Jones Act cases. Again, we would note that the instant case does not involve a claim under the Jones Act, but rather it involves a claim under the general maritime law based upon unseaworthiness.

A more important distinction, however, may be found by comparing the drilling rigs involved in *Offshore Co.* and *Producers Drilling* with the dry dock involved in the instant case. These drilling rigs are out in the Gulf of Mexico and persons working upon them are obviously subjected to the hazards and perils of the sea. Furthermore, these drilling rigs are frequently moved from place to place on the high seas as one drilling project is completed and a new one is begun. On the other hand, the dry dock involved in the instant case is in no way subject to the

hazards and perils of navigation. This dry dock is affixed to the land, and it has never been moved from the point where it was originally placed in the water on the banks of Lake Ferguson after it was constructed. Whereas, the drilling rigs may not be vessels in the traditional sense, their use and location on the high seas does justify the conclusions reached by the courts in *Producers Drilling* and other cases. On the other hand, a dry dock such as that involved here is much, much further removed from the traditional concept of a vessel than even the floating drilling rigs out in the Gulf of Mexico. Indeed, it is far more appropriate to compare the dry dock here with the marine railway and the land dry dock than it is to compare the instant dry dock with drilling rigs. See *Avondale Marine Ways, Inc.* v. *Henderson, supra*, 346 U.S. at 367, 98 L.Ed. at 79 (concurring opinion). There is no question but that these other two types of dry docks are not vessels. Functionally, a floating dry dock is in no way different from these other two types of dry docks, and therefore it would create an arbitrary and absurd distinction in the law to call floating dry docks "vessels" while other dry docks are not "vessels". Accordingly, we submit that the instant case is not in conflict with the other decisions of the United States Court of Appeals for the Fifth Circuit cited above.

It is apparent from a reading of the opinion of the Court of Appeals below that the panel which decided the case saw no conflict in this decision and the cases mentioned above. It is noteworthy that Judge Thornberry, who wrote the opinion for the Court in *Producers Drilling Co.* v. *Gray*, was a member of the panel in the instant case below. Surely, if Judge Thornberry had seen a conflict in the decision below and his own opinion in *Producers Drilling*, he would have found some appropriate method of expressing his views. Respondent submits, of course, that Judge Thornberry found no conflict in the instant case and

Producers Drilling for the reason that no conflict exists. Therefore, this Court certainly should not become embroiled in such an imaginary controversy within the Fifth Circuit.

CONCLUSION

For the reasons stated above, Respondent respectfully and with deference suggests that there are no special or important reasons present in this case to support the granting of the Petition for a Writ of Certiorari. The opinion of the Court of Appeals is sound and lucid. There is no reason for further review.

Respectfully submitted,

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CERTIFICATE

I, J. ROBERTSHAW, member of the Bar of this Court, hereby certify that I have this day mailed, postage prepaid, two true copies of the above Brief in Opposition to Certiorari to Honorable Fountain D. Dawson, Attorney at Law, P. O. Box 1151, Greenville, Mississippi 38701, to Honorable Robert G. Hebert, Attorney at Law, 608 American Bank Building, New Orleans, Louisiana 70130, and to Honorable Samuel C. Gainsburgh, Kierr & Gainsburgh, Attorneys at Law, 1718 National Bank of Commerce Building, New Orleans, Louisiana 70112.

This 7th day of August, 1969.

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J. ROBERTSHAW